No. 80-1707

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LEVERAGE FUNDING SYSTEMS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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Petitioners contend that the charges against them should be dismissed (1) because fewer than 12 of the grand jurors who voted to indict attended all grand jury sessions and (2) because the government failed to present exculpatory evidence to the grand jury.

Petitioners were indicted in the United States District Court for the Central District of California on 29 counts of mail fraud and fraud in the offer and sale of securities, in violation of 18 U.S.C. 1341 and 15 U.S.C. 77q(a), 77(x). At their request, the district court required the government to disclose grand jury voting and attendance records (Pet. App. A-2, A-3). Those records revealed that of the 19 grand jurors who unanimously voted to indict, nine were present at all 13 grand jury sessions, five were present at 12 sessions, and five others were present at between 6 and 11 sessions (Pet. App. A-3).

Petitioners moved to dismiss the indictment, contending that at least 12 of the grand jurors who vote to return an indictment must attend all sessions at which evidence is presented. The district court granted the motion and dismissed the indictment without prejudice (Pet. App. B-1 to B-21; 478 F. Supp. 799). The court of appeals reversed, one judge dissenting (Pet. App. A-1 to A-15; 637 F. 2d 645).

Petitioners now contend (Pet. 16-26) that the court of appeals erred in reinstating the indictment.[1] The court's ruling, however, is not a conviction. It places petitioners in precisely the same position they would have occupied if the district court had not dismissed the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present these contentions, together with any others they may have, to this Court in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature. See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977).

We note in closing that the order of the district court dismissing the indictment was entered on October 17, 1979. Trial of this case had been delayed for more than a year and a half as a result. This Court should not further prolong this delay by undertaking interlocutory review.[2]

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[1]Petitioners also contend (Pet. 27-31) that the government must present exculpatory evidence to the grand jury. But petitioners did not squarely present this claim to the district court and cite nothing in the record to suggest that the government did not follow its policy of presenting exculpatory evidence, even though not required to do so. See *United States* v. *Y. Hata & Co.*, 535 F. 2d 508 (9th Cir.), cert. denied, 429 U.S. 828 (1976).

[2]Since this case is interlocutory, we are not responding to the merits of petitioners' contentions. We will, of course, respond on the merits if the Court so requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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